Nos. 87-1589, 87-1888, 88-217 and 88-711

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1988

SUPREME COURT, U.S.
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THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, AND THE INTERSTATE COMMERCE COMMISSION, RESPONDENTS

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE UNITED TRANSPORTATION UNION, THE BURLINGTON NORTHERN RAILROAD COMPANY, AND THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD AND EIGHTH CIRCUITS

MEMORANDUM OF THE INTERSTATE COMMERCE COMMISSION

ROBERT S. BURK
General Counsel
HENRI F. RUSH
Deputy General Counsel
JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel
CLYDE J. HART, JR.
Attorney
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, D.C. 20423
202/275-7009

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MEMORANDUM OF THE INTERSTATE COMMERCE COMMISSION

This memorandum responds to the amicus brief on the merits filed by the Solicitor General on November 7, 1988, in Nos. 87-1589 and 87-1888. It also responds to

the suggestion filed by Railway Labor Executives' Association (RLEA) (letter to the Court dated November 2, 1988) that the controversy out of which the Commission's petition in No. 88-711 arises may become moot, by virtue of Burlington Northern Railroad's (BN) management having capitulated to the demands of its employees for conditions upon its proposed sale of a rail line to Montana Rail Link (MRL) as the only means remaining which would permit carrying into effect the Commission authorized transaction.

1. We are pleased that the Solicitor General has added his voice to those of all others associated with this country's rail industry in urging this Court to decide the issues of the relationship of the Interstate Commerce Act, 49 U.S.C. 10101 et seq., (ICA) and Commission orders authorizing transactions thereunder to (1) the duty to negotiate under the Railway Labor Act, 45 U.S.C. 151 et seq. (RLA), and (2) the ability of courts to enjoin strikes which threaten to negate or unilaterally modify the terms of Commission authorized transactions. Since the *P&LE I* and *P&LE II* decisions of the Third Circuit below, the Commission's program to foster the formation of shortline and regional railroads, which the court below itself recognized was consistent with the will of Congress and in the public interest has come to a virtual standstill.[1]

Concomitantly, during the same period, abandonment applications have increased for the first year since the program has been in effect. Plainly such a result serves

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[1] As the Commission has noted in prior submissions to the Court in these proceedings the number of new railroad formations since the Third Circuit's decisions has fallen by 50%. Moreover, the rail track mileage encompassed in 49 U.S.C. 10901 *Class Exemption* filings has fallen by 85%.

no one's interest. The sooner this Court can act to straighten out the morass created by the decisions below the better for all concerned.

2. We are somewhat surprised that the Solicitor General continues to insist, however, in deciding these issues of seminal importance to the industry and to the Commission's performance of its approval and oversight functions, that the Commission's petition should not be heard by the Court. The court below granted the Commission amicus and subsequently full intervenor status in recognition of the importance of ascertaining the Commission's views. Moreover, the quotation from the court below chosen by the Solicitor General to support his position (with which we agree) that the *P&LE* cases are not moot (Brief of the United States, pp. 9-10, fn.8) presupposes that the Commission is a proper party to these proceedings whose views, among others, ought to be taken into account.

3. It is the Commission's position that 88-711 is not made moot by virtue of the settlement between BN and UTU. That settlement, far from mooting the Commission's petition in No. 88-711, underscores the urgency of this Court resolving the issues presented. By holding itself unable to enjoin a strike, the majority of the panel below has given to rail labor the power to dictate the terms upon which transactions authorized by the Commission as in the public interest will go forward – if at all. See, e.g., *P&LE* v. *RLEA*, No. 87-1888, where the transaction authorized by the Commission has been effectively negated. This situation represents a continuing affront to, and usurpation of, the exclusive authority vested in the Commission by Congress to approve transactions relating to consolidations, sales and other dispositions of rail assets in the rail industry. This in and of

itself would permit the Court to conclude that the controversy is a continuing one and not mooted by settlement.

Furthermore, as the Commission stated in its reply to the opposition in No. 88-217, the controversy arising out of the Commission's claim that the ICA must preempt other laws which act as obstacles to transfers under 49 U.S.C. 10901 is "capable of repetition yet evading review" *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498 (1911). Clearly, until this Court resolves these issues the orders of the Commission will continue to be subject to this challenge. *Weinstein* v. *Bradford,* 423 U.S. 147, 149 (1975), quoting *Sosna* v. *Iowa,* 419 U.S. 393 (1975).

4. However, because of the possibility of settlement in *BN* v. *UTU,* 848 F.2d 856 (8th Cir. 1988) in which RLEA represents that all parties other than the Commission will agree not to file for review by this Court, and because of the urgency of the situation in the industry, and because all relevant parties appear to be ready to move forward on the *P&LE* petitions, the Commission now agrees that the *P&LE* petitions represent the best vehicle for the resolution of the critical issues of the relationship of the ICA, RLA and the Norris-LaGuardia Act, 29 U.S.C. 101 et seq. (NLGA) presented in the Commission's petitions in Nos. 88-217 and 88-711.

CONCLUSION

For the reasons set forth herein, petitions for writs of certiorari to the United States Court of Appeals for the Third Circuit filed by the Pittsburgh and Lake Erie Railroad Company in Nos. 87-1589 and 87-1888 and by the Commission in No. 88-217 should be granted, and the cases should be consolidated and set for briefing and argument as expeditiously as possible.

ROBERT S. BURK
General Counsel
HENRI F. RUSH
Deputy General Counsel
JOHN J. MCCARTHY, JR.
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CLYDE J. HART, JR.
Attorney
Interstate Commerce Commission
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Washington, D.C. 20423
202/275-7009

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